Acme Marble & Granite Co., Inc. and Construction and General Laborers' Local Union 1290, affiliated with Laborers' International Union of North America, AFL-CIO. Case 17-CA-8556

# 9 August 1984

# **DECISION AND ORDER**

# By Chairman Dotson and Members Hunter and Dennis

On 30 April 1980 Administrative Law Judge James T. Rasbury issued the attached decision. The General Counsel and the Charging Party filed exceptions and a supporting brief. Thereafter, the Respondent filed cross-exceptions with a supporting brief and an answering brief to the exceptions of the General Counsel and the Charging Party.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

# **ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

#### DECISION

### STATEMENT OF THE CASE

JAMES T. RASBURY, Administrative Law Judge. This case was tried before me in Kansas City, Kansas, on September 27, 1979. A complaint was issued on May 29, 1979, based on a charge filed by the Construction and General Laborers' Local Union 1290 (the Union) on October 12, 1978, alleging that Acme Marble & Granite Co. (Respondent) had violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), in that Respondent had refused to abide by the terms and conditions of the collective-bargaining agreement between the Respondent and the Union effective from May 23, 1977, to March 31, 1980.

On the entire record<sup>1</sup> including my observation of the demeanor of the witnesses and after giving due consideration to the very excellent briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

### FINDINGS OF FACT

# I. JURISDICTION

The Respondent, a State of Louisiana corporation, is engaged in the construction of mausoleums at various locations throughout the United States including a site at 83d Street and Quivera Road, Lenexa, Kansas (the facili-

ty). The Respondent, in the course and conduct of its business operations within the State of Louisiana, annually purchases goods and services valued in excess of \$50,000 directly from sources located outside the State of Louisiana. The Respondent, in the course and conduct of its business operations within the State of Louisiana, annually sells goods and services valued in excess of \$50,000 directly to customers located outside the State of Louisiana.<sup>2</sup> Respondent admits and I find the Respondent to be, and at all times material to have been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. LABOR ORGANIZATION

The Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICE

#### The Facts

The facts of this case are not in serious dispute and have been taken primarily from stipulations entered into by the party and from undenied or unrefuted testimony.

As stated earlier, Respondent is a cemetery developer engaged in the development of mausoleums throughout the United States. It has performed work in approximately 36 States. Normally it is engaged in approximately 30 to 40 such jobs per year. Respondent employs approximately 12 superintendents who supervise the work at the various locations. In some instances the work is performed on a nonunion basis and in other instances on a union basis. The decision as to whether a job would be bid on a union or nonunion basis is made prior to the submission of the bid to the customer. That decision depends on a variety of factors, including the work force available in the area, the kinds of subcontractors available, and similar type decisions by the owners. In the event that a decision is made to perform the work on a union basis, and the Company elects to perform the work itself rather than through a general contractor, the Company talks with the representatives of the local labor organizations involved, secures copies of their agreements, and discusses the use of their people on the project. Under these circumstances it might execute agreements with a business agent and use the union referrals of employees exclusively. Frequently the Company elects to have the work performed through a local general contractor with one or more of their superintendents available to direct and to supervise the work of the general contractor.

Respondent began a project on September 27, 1976, at Mount Olivet Cemetery in Jackson County, Missouri. At various times during October 1976, Respondent employed eight laborers on this particular project. Respondent began a project on October 3, 1976, at Mount Calvary Cemetery in Wyandotte County, Kansas, during Oc-

<sup>&</sup>lt;sup>1</sup> The General Counsel's unopposed motion to correct the transcript in several particulars is granted, and the motion is incorporated in the exhibit file as ALJ Exh. 1.

<sup>&</sup>lt;sup>2</sup> Par. 2 of the General Counsel's complaint was amended at the hearing to reflect the jurisdictional data set forth above.

tober 1976 where they employed three laborers on the project.

Respondent entered into a "me too" type of contract stipulation with Locals No. 264, 555, and 1290 of the Western Missouri and Kansas Laborers District Council of the Laborers, International Union of North America, AFL-CIO, which was dated October 27, 1976.<sup>3</sup> The collective-bargaining agreements set forth as an appropriate unit all employees performing any type of construction work, which has historically and traditionally been performed by laborers in the geographic area of the agreement, for the term of the agreement. Article II of the agreement sets forth the jurisdiction of the agreement and extends to and includes work performed in the counties of Jackson, Clay, Platte, Ray, Cass, Saline, Lafayette, and Carroll in Missouri; and Wyandotte, Johnson, and Miami in Kansas.

The Wyandotte County Mount Calvary project and the Jackson County Mount Olivet project were Respondent's only projects in 1976 and 1977 within the geographical jurisdiction of the collective-bargaining agreements. A majority of the laborers at each site were members of the Union throughout the duration of the construction period (see Jt. Exhs. 4-A through 4-I for a list of the employees and their union affiliation).

The work at the Jackson County Mount Olivet Cemetery was completed on March 20, 1977. The work at the Wyandotte County Mount Calvary Cemetery project was completed on July 17, 1977. From July 17, 1977, until July 28, 1978, Respondent performed no work on projects within the geographical jurisdiction of the collective-bargaining agreements.

On July 28, 1978, Respondent began work on a project at Resurrection Cemetery located in Johnson County, Kansas, which is within the geographical jurisdiction of the collective-bargaining agreement then in effect between the parties (Jt. Exh. 3, art. II).

While there is no contention that Respondent failed to follow the terms of the collective-bargaining agreements on either of the first two projects (the Mount Calvary and Mount Olivet projects), Respondent does not deny having employed laborers without use of any referral system from the Union on the Resurrection Cemetery project in Johnson County. The fringe benefits and supplemental dues provided for in article VIII, page 15 of the contract were not paid by Respondent. The General Counsel offered no evidence and there appears to be no contention made by the parties that any of the employees at the Resurrection Cemetery project had ever designated the Union as their collective-bargaining representative. Respondent does not deny that it did not adhere to the terms of the collective-bargaining agreements insofar as the work performed at the Resurrection job was concerned.

### Analysis and Contentions of the Parties

The General Counsel contends that under certain circumstances the traditional concept of Section 9(a) of the Act is equally applicable to employers in the building and construction industry on projects of short duration. In this instance the General Counsel views the Union as having become a 9(a) representative, because the contract entered into by the parties extended exclusive recognition of the Union through a specified area; and on or about the date the contract was executed the Union represented a majority of the Respondent's employees in the geographical area covered by the contract. The General Counsel seeks to ignore the specific language of Dee Cee Floor Covering, 232 NLRB 421 (1977), as a situation applying to a more traditional 8(f) type of relationship. The General Counsel desires to regard this situation as a 9(a) relationship in view of the manner in which the initial contracts were signed.

Respondent argues that Congress specifically expressed a contrary opinion in the report of the House of Representatives' Committee on Education and Labor (1 Leg. Hist. 759, 777, 1959) wherein the report makes clear that the House considered each construction project as a separate unit or employing entity in which under "Wagner Act ruling" the absence of majority status rendered unlawful exclusive bargaining contracts. Thus, Respondent observes, it became necessary to enact Section 8(f) of the Act. Respondent further argues that if the geographical jurisdiction of the union defined the unit, a union once having established majority status on one building project within the geographical area of the contract, would require no remedial legislation to maintain such status for subsequent projects within the same geographical unit of the collective-bargaining agreement.

The Board in R. J. Smith Construction Co., 191 NLRB 693 (1971), held that a union which is party to an 8(f) agreement does not acquire an irrebuttable presumption of majority status. Unlike the current situation, in R. J. Smith supra, the employer had a stable complement of employees; however, the majority were not union members and at no time during the parties' contractual relationship had the Union ever proven to be a majority representative. In the Smith case the Board decided that there had been no violation, because the General Counsel and the Charging Party failed to prove majority support for the Union at any time.

The Charging Party argues that it is clear that during the term of a contract of reasonable duration the Board has determined that "no question concerning representation [may] validly be raised." Hexton Furniture Co., 111 NLRB 342, 344 (1955). Accordingly it argues when Respondent withdrew recognition from the Union during the middle of a contract term it violated Section 8(a)(5) of the Act. The Charging Party argues that Respondent makes the mistaken assumption that Section 8(f) governs all agreements between employers and unions in the construction industry. The Charging Party contends that Section 8(f) provides only a limited exemption from the normal operation of the labor act and cites language from the U.S. Supreme Court in Iron Workers Local 103 (Higdon Contracting), 434 U.S. 335, 350 (1978), wherein

<sup>&</sup>lt;sup>3</sup> There is no evidence that the Respondent signed an association contract or became part of a multiemployer unit. The contract stipulation merely binds the parties to adhere to the contract between the unions and the Builders' Association of Missouri (see Jt. Exhs. 1, 2, and 3).

the Court stated it is "undisputed that when the Union successfully seeks majority support, the prehire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." The Charging Party further argues that they had achieved majority support in a multisite unit and that there is no evidence that a majority of the employees at the Resurrection job did not support Local 1290 even though they were not members of the Union.

The arguments and briefs submitted by each of the parties involved in this case have been exceptional and this has been a difficult case to decide. Nevertheless I am impressed by the fact that there is nothing in the Act to indicate that the Union's geographical jurisdiction establishes the bargaining unit and by the precise and clearcut language of the Board as set forth in *Dee Cee Floor Covering*, supra, page 42:

Such prehire agreements do not, however, give rise to the presumption of a majority status on behalf of the union. Thus where a union fails to prove that it has obtained majority status among the employer's employees an employer may withdraw recognition from that union and/or make unilateral changes in the contractual working conditions without thereby violating Section 8(a)(5) of the Act.

The Board went on to say, "The mere fact that the Union might indeed have represented a majority of the employees at Respondent Dee Cee's previous jobsites is of no consequence inasmuch as the Union must demonstrate its majority at each new jobsite in order to invoke the

provisions of Section 8(a)(5) of the Act" (emphasis supplied). This language seems to be crystal clear and completely dispositive of the instant situation and I herewith find that Respondent, Acme Marble and Granite Co., had every legal right to ignore their agreement with the Union at the Lenexa, Kansas project and did not violate Section 8(a)(5) of the Act.

#### CONCLUSIONS OF LAW

- 1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent has not engaged in the unfair labor practices alleged in the General Counsel's complaint in this proceeding for the reasons which have been set forth hereinabove.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

It is ordered that the complaint be dismissed in its entirety.

<sup>4</sup> If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."